Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1996

JOHN J. HINDERA,

Petitioner,

vs.

KHI V. THAI, INDIVIDUALLY AND AS OFFICIAL OF FLORIDA ATLANTIC UNIVERSITY, LEONARD KOOPERMAN, INDIVIDUALLY AND AS OFFICIAL OF FLORIDA ATLANTIC UNIVERSITY, ROSALYN Y. CARTER, INDIVIDUALLY AND AS OFFICIAL OF FLORIDA ATLANTIC UNIVERSITY, LANCE DE-HAVEN- SMITH, INDIVIDUALLY AND AS OFFICIAL OF FLORIDA ATLANTIC UNIVERSITY, AND FLORIDA ATLANTIC UNIVERSITY,

Respondents.

Petition for Writ of Certiorari to the United Stated Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the failure to submit to a jury the factual question of whether a stigma, implicating a deprivation of a liberty interest, is attached to a (public) false accusation that a faculty member of a state university committed sexual harassment combined with the mid-year nonrenewal of that faculty member's contract, constitutional reversible error?

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OPINION BELOW

The judgment of the Eleventh Circuit Court of Appeals, issued without opinion, entered on November 22, 1996, is reprinted in the Appendix at 3a. The denial of petition for rehearing, entered on February 21, 1997, is reprinted in the Appendix at 1a. The summary judgment and opinion of the United States District Court for the Southern District of Florida, entered on July 28, 1996, is reprinted in the Appendix at 5a. None of the decisions were published.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit, issued without opinion, affirming the summary judgment in favor of defendants of the United States District Court for the Southern District of Florida, was entered on November 22, 1996. (App. 3a). A rehearing was requested and subsequently denied on February 21, 1997. (App. 1a). This petition for writ of certiorari is being filed within 90 days of the February 21, 1997 denial of rehearing. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitutional Provision

Section One of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provision

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE AND FACTS

A. Procedural History And Facts

The Petitioner, Dr. John Hindera, joined the faculty at Florida Atlantic University as a junior professor in the School of Public Administration in 1991. He was a "tenure track" professor, meaning that he was under consideration for eventual tenure. Dr. Hindera was submitted for peer review on April 7, 1992, wherein the Public Administration faculty endorsed his self-evaluation of "outstanding" and sent a memorandum to the

administration stating that Dr. Hindera was making "sufficient progress so as to result in an affirmative recommendation for tenure." Leonard Kooperman, the Department Chair, and Rosalyn Carter, Acting Dean of the University, signed off on the recommendation.

Approximately a month later, Dr. Hindera was summoned to a meeting with Acting Dean Carter and Dr. Khi V. Thai, who later took over as Department Chair. At this meeting, Dr. Hindera was advised that some female colleagues had complained about his touching them and he was counseled not to touch anyone or try to discern the identity of the complainants.

On June 3, 1992 Dr. Hindera attempted to get the attention of a departmental secretary, Rita Kraemer, and tapped her on the shoulder. In response, Kraemer wheeled around and advised Dr. Hindera not to touch her and that she did not like to be touched. As a result, Dr. Hindera discerned that Kraemer was the person who had complained to Dr. Carter. Dr. Hindera asked Kraemer to accompany him to his office where he verified his suspicion and offered her an apology, which she accepted. Approximately one week later, Dr. Hindera received a letter from Dr. Carter accusing him of having placed his arm around Kraemer and, contrary to her instructions, having sought out Kraemer's identity as the complainant. The letter closed by warning Dr. Hindera that the University "does not tolerate sexual harassment in any form under the circumstances" and that "federal law protects individuals who believe they are victims of sexual harassment from reprisal." A copy of the University's policy on sexual harassment was appended to the letter and the document was placed in Dr. Hindera's personnel file. As Dr. Hindera was a public employee, his personnel file was a public document. [1]

---

1. Dr. Hindera's personnel file is subject to public scrutiny. *See Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1045 (11th Cir. 1989), citing Fla. Stat. § 119.01, *et seq.* (1987).

Dr. Hindera responded to the letter, asking Dr. Carter to remove the letter from his personnel file pending an opportunity to rebut her unsubstantiated allegations of sexual harassment. Dr. Carter replied by memorandum, stating that the University's attorney had advised her not to engage in further discussion with Dr. Hindera. Dr. Hindera then filed a grievance pursuant to the United Faculty of Florida ("UFF") Collective Bargaining Agreement. Dr. Hindera's grievance objected to Dr. Carter's June 11, 1992 letter on the basis that it accused him of sexual harassment of Rita Kraemer along with intimidation and reprisal against Ms. Kraemer.

The grievance was presided over by a Dr. Robert Huckshorn. Dr. Huckshorn did not interview Dr. Hindera nor did he speak to Rita Kraemer. However, he did speak with Dr. Carter and received *ex parte* communications from the University's attorney. Only two days later, Dr. Huckshorn published his findings and denied Dr. Hindera's grievance. Huckshorn found, *inter alia,* that Dr. Hindera's personnel file was not public. He also erroneously stated that: (1) "Ms. Kraemer reviewed a draft of the final letter (*i.e.,* June 11, 1992) and approved it as accurate"; and (2) that Rita Kraemer considered Dr. Hindera's conduct to be "harassing in nature." On the contrary, Kraemer testified at deposition that Dr. Hindera's touching was not sexual in nature and that she did not recall having reviewed or approved Dr. Carter's June 11th letter.

One day after Huckshorn's report was issued, the University Provost, DeHaven-Smith, sent Hindera a termination letter canceling his contract effective December 22, 1992, *i.e.,* in the middle of the academic year. DeHaven-Smith's letter was followed by a more detailed letter from Mary McBride, who later succeeded DeHaven-Smith as Provost. According to McBride, the reasons for Dr. Hindera's non-renewal concerned: (1) his persistence in determining the identity of a student who

had complained about one of his classes; (2) lavish spending on long-distance; and (3) "altercations and confrontations" with his new Chair, Dr. Khi V. Thai, as well as rudeness towards support staff.

Dr. Hindera grieved Huckshorn's ruling in the next stage of the grievance process, a Step-2 hearing. The Step-2 hearing was presided over by Jacqueline Haskins. The issues raised at the Step-2 hearing included the lack of basis for the June 11, 1992 letter and the retaliatory nature of his non-renewal.

Ms. Haskins' Step-2 report dated November 9, 1992, went far beyond the issues discussed at the hearing. For example, the report discussed, and attached as an exhibit, a memo dated October 6, 1992 from Dr. Thai to Dr. Carter which accused Dr. Hindera of making a suggestive remark to a Ph.D. student, Susan Day. The report also attached a memo dated October 6, 1992 from Dr. Kooperman stating that he allegedly witnessed Dr. Hindera come up behind Dawn Smith, a department secretary, and place his arms around her. Additionally, Ms. Haskins considered a memo from Eileen Graham, a temporary secretary, which stated that Dr. Hindera was rude to support staff. Each of these memoranda were written *after* the Step-2 hearing had concluded and none of the incidents described therein were discussed at the hearing itself. Additionally, once again, Rita Kraemer was not interviewed or called to testify at the Step-2 hearing. Moreover, Haskins did not investigate the alleged incidents involving Susan Day, Dawn Smith or Eileen Graham. Both Susan Day and Dawn Smith later testified under oath that the alleged "incidents" never happened and, moreover, that Dawn Smith had so advised Drs. Kooperman and Carter.

In addition, Haskins' report also touched on one of the incidents described in Provost McBride's letter. Haskins found that Dr. Hindera had been "involved in a problematic situation"

with a female student and attached a December 2, 1992 memorandum from Dr. Carter describing the incident. According to the attached memo, the incident did not involve touching nor did it implicate Dr. Hindera. Once again, Haskins did not solicit testimony from anyone connected with the incident.

After the Step-2 grievance was denied, Dr. Hindera asked his union to represent him in the next stage of the process, a Step-3 arbitration hearing. The union, declined his request and the Step-2 decision became final.

On June 21, 1994, Dr. Hindera filed suit against Drs. Kooperman, Carter, DeHaven-Smith and Thai, both individually and as officials of Florida Atlantic University. He also sued Florida Atlantic University. Hindera's complaint alleged, *inter alia*, violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 arising from sexual discrimination, and also sought damages under 42 U.S.C. § 1983 claiming denial of a property interest in employment and a liberty interest in reputation and future employability. The defendants filed a Motion to Dismiss and the trial court dismissed the University, ruling that Dr. Hindera should have sued the Board of Regents instead. The trial court denied the remainder of the motion.

On May 8, 1995, the remaining defendants jointly filed a Motion for Summary Judgment. In his affidavit, supporting his memorandum opposing defendants' Motion for Summary Judgment, Dr. Hindera testified to the difficulty that he encountered finding suitable reemployment because of the mid-year nonrenewal and the stigma associated with the sexual harassment allegation. On July 20, 1995, the trial court held a hearing in which it dismissed defendant DeHaven-Smith from the suit and reserved ruling on the balance of the Motion for Summary Judgment. (R2-79-59-60). On July 28, 1995, the trial

court rendered a written order granting final summary judgment as to all of the Defendants on all claims. (App. 5a).

The Eleventh Circuit Court of Appeals affirmed the trial court's ruling, without issuing an opinion, on November 22, 1996. (App. 3a). Hindera filed a petition for rehearing which was denied by the Eleventh Circuit on February 21, 1997. (App. 1a).

B. Liberty Interest

Section One of the Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Additionally, Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Dr. Hindera contends that the lower court erroneously denied that his liberty interest, provided by section one of the Fourteenth Amendment, was violated under color of law in violation of Title 42 U.S.C. § 1983.

The trial court predicated its conclusion that Dr. Hindera lacked a property interest[2] in his employment on *Board of Regents v. Roth*, 408 U.S. 564 (1972). It found that the facts of *Roth* strongly resembled the facts of the instant case and that the holding in *Roth* governed. The trial court was principally interested in the lack of tenure possessed by both complainants.

Roth by no means exhausted the possible realm of recognized property interests and the facts are dissimilar. For example, the plaintiff in *Roth* was given a one-year appointment and was terminated at the end of the year. Since he was allowed to finish out the year, school policy dictated that the Board of Regents did not have to give him a reason for non-renewal. Also, there was no state statute or university rule or policy which secured any interest in his re-employment. Thus, in *Roth*, other than "an abstract concern in being rehired," the plaintiff could not produce any evidence showing the creation of a property interest. Therefore, the Court correctly concluded that Roth lacked a legitimate expectation of continued employment.

In the instant case, the trial court found that "because [Hindera] was hired for a one year appointment in a tenure track position with no secured interest in re-employment for the next year, plaintiff has no Constitutionally protected property interest in his employment." (App. 13a). Dr. Hindera submits that this was not the intent of this Court either in *Roth* or in *Perry v. Sinderman*, 408 U.S. 593 (1972).

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2. Similar to a property interest, states can legislate a liberty interest. *See, e.g., Hewett v. Helms*, 459 U.S. 460, 471 (1983).

Perry was decided during the same term and on the same day as *Roth*. *Perry* built on *Roth* by juxtaposing an explicit tenure provision with a quasi-agreement "implied from the promisor's words and conduct in the light of the surrounding circumstances . . ." Thus, both sources give rise to a property/ liberty interest in employment (since a state may legislate a liberty interest).

The property interest in *Perry* had its source in an unwritten, informal tenure system at the school. Another source, as in the case at bar, may be found in the formal rules and policies of the institution itself. *Perry* recognized that a claimant who is accorded a "benefit" by the state may have an independent claim to due process:

> A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually exclusive understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Id. at 601. This "unwritten 'common law' in a particular university . . . shall have the equivalent of tenure." 408 U.S. at 602. As permitted by *Hewitt v. Helms*, 459 U.S. 460 (1983), Dr. Hindera was given a protected liberty interest in his employment, created by the state, by virtue of the protections afforded by the UFF Bargaining Agreement and Florida Atlantic University policies.

C. "Stigma" And The Liberty Interest

At the July 20, 1995 hearing on the Motion for Summary Judgment the trial court judge admitted he was not sure what a liberty interest was:

> THE COURT: What you are saying is that any procedural right is now a property right. I saw that in your brief and I disagree with you . . . .
>
> MR. SLOTKIN: That's fine. Then I finished that line of argument.
>
> THE COURT: I mean, you have either got a property right or you have got a due process right, but they don't merge. You don't have a due process right is not a property right.
>
> MR. SLOTKIN: Don't you mean to say if I have a property right or a liberty interest then I am entitled to due process of law?
>
> THE COURT: Well, all right, a liberty interest, but I have been asking you to define your liberty interest and I'm not sure what that is. You say a name clearing hearing.
>
> MR. SLOTKIN: Okay, Roth has two subsets and I am not sure I understand the distinction for a liberty interest. One of them is the stigma. If my client is subject to a stigma, he has a right to a name clearing hearing.

(R2-79-47-48).

The Eleventh Circuit standard for establishing the deprivation of a liberty interest without due process is set forth in *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1042-43

(11th Cir. 1989). Accordingly, the lower court relied on *Buxton* in the final summary judgment. (App. 14a). *Buxton* requires that a plaintiff prove: (1) a false statement; (2) of a stigmatizing nature; (3) attending a governmental employee's discharge; (4) made public; (5) by the governmental employer; (6) without a meaningful opportunity for employee name clearing. *Id.*

At the summary judgment hearing, the trial judge engaged in a discussion regarding stigma as it related to Dr. Hindera's liberty interest:

> THE COURT: But the question is the stigma you say occurred in the letter and as matter of law there is no stigma there, he has not been accused of a crime or any sexual impropriety. He was just cautioned that he shouldn't touch females while he is talking to them because they don't appreciate it, they didn't like it. That is not a stigma.

(R2-79-48).

* * *

> MR. SLOTKIN: My client's personnel file has damning material in it now as a result of what happened, and number two, my client has had difficulty obtaining subsequent employment because in each instance he had to explain to his prospective employers why he left midyear.

(R2-79-48-49). Moreover, Dr. Hindera's counsel specifically pointed out to the trial judge that the issue of whether Dr. Hindera had suffered a stigma that would invoke his liberty interest was

a matter of fact that should be left to the jury to decide. (R2-79-51-52). At the conclusion of the very same hearing where he stated he did not know what a liberty interest was, the trial judge ruled on the stigma issue:

> THE COURT: The claim is also made that he had a liberty interest. The liberty interest is subsumed under the claim that he had — there was stigmatizing information that was placed in his file. I find as a matter of law that the letter that was written, I think it was June 11, 1992, it was not stigmatizing. It did not allege any moral charges, any criminal conduct or any sexual conduct. It was clearly a cautionary letter to him that he should avoid in talking with people touching females because it was not wanted and it was disturbing to them, although it clearly says that it was not sexual harassment. (R2-79-57-58). Moreover, upon finding out that Dr. Hindera had secured other employment, the trial judge commented "[A]pparently your client has gotten a new job so he couldn't have been so stigmatized."

(R2-79-60).

In making his ruling and comment, the trial judge ignored the implications of having the sexual harassment policy of the University attached to the letter that was placed in Dr. Hindera's public personnel file along with the contemporaneous mid-year nonrenewal of his contract. The trial judge also ignored the fact that Dr. Hindera had been terminated from his faculty position as a result of being falsely accused of sexual harassment, failing to consider that *all* of the alleged victims had come forward and

testified that they were not harassed. Moreover, his comment regarding Dr. Hindera's current employment can only be construed as a finding that there can be no stigma suffered in an employment situation if one manages to find a job in their field afterwards, regardless of what the job is or its terms and conditions.

Dr. Hindera raised the liberty interest/stigma issue on appeal to the Eleventh Circuit. The appellate court affirmed the trial court, without opinion, and denied Dr. Hindera's petition for rehearing.

A protected liberty interest in employment may arise through employer rules, policies and bargained-for rights. Likewise, Dr. Hindera's right to a liberty interest derives both from his Bargaining Unit Agreement as well as the University's policy. These policies protect a grievant from reprisal and false accusations of harassment.[3] Among other things, the Bargaining Agreement gave an employee, who is being considered for termination, ten days to rebut the asserted reasons for nonrenewal before a final decision is made. The Agreement also provides employees with a Step-1 and Step-2 grievance mechanism in which supporting and opposing documents are shown to both sides and the issues are clearly delineated.

The University pretended these policy rights did not exist by short-circuiting the procedures provided by the Bargaining

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3. University Policy 6C5-5.012(2)(b) states that a department head, college dean or provost who learns of sexual harassment is expected to conduct an informal investigation. (R1-49-9). Although enacted for the protection of victims of harassment, it also has a salutary effect on persons who, like Hindera, are falsely accused of sexual harassment since an investigation would have cleared him of wrongdoing. The same holds true for Policy 6C5-5.012(4), mandating that persons who are found to have given false information or false accusations of harassment shall be subject to discipline.

Agreement in an outrageous manner. Dr. Hindera was advised of his termination with no opportunity to respond and without the University providing any reasons. Furthermore, one of the defendants conceded that the reasons offered two weeks later were not the real reasons behind the termination. Moreover, both the Step-1 and Step-2 hearing officers had *ex parte* contacts with the University, they did not interview witnesses nor did they share the University's written submissions with Dr. Hindera. Most egregious was the Step-2 hearing officer's consideration of documents that were written *after* the hearing concluded and which were not even related to the issues at hand. Therefore, Dr. Hindera had no opportunity to rebut these new accusations, which were not only false but which the University knew to be false at the time of the submission.

The trial court did not reach the due process issue due to its mistaken conclusion that Dr. Hindera had not been stigmatized. In fact, Dr. Hindera had offered competent testimony showing that he was stigmatized by being falsely accused of sexual harassment and by having been terminated mid-year. The defendants failed to offer any evidence regarding either stigma or interference with future employability to contest Dr. Hindera's evidence. Therefore, the trial court should not have entered summary judgment and should have allowed the issue to go to a jury.

REASON FOR GRANTING THE WRIT OF CERTIORARI

I.

THE COURT OF APPEALS DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW CONFLICTS WITH THE DECISION IN *WISCONSIN v. CONSTANTINEAU.*

The court of appeals decision, affirming the trial court's grant of summary judgment, was issued without an opinion. As discussed above, the trial court predicated its decision on Dr. Hindera's property interest, and accordingly his legislated liberty interest, on *Board of Regents v. Roth*, 408 U.S. 564 (1972), relying on its belief that the facts of *Roth* strongly resembled the facts in the instant case and that the holding in *Roth* governed. However, the facts in the instant case are markedly different than the facts in *Roth*, as enumerated above. Additionally, the trial court did not consider the implications of *Perry v. Sinderman*, a case that was decided the same day as *Roth*, and provided yet another source of a property/liberty interest in Dr. Hindera's employment. *See, Perry v. Sinderman*, 408 U.S. 593 (1972).

When it briefly touched on the stigma element again, in the final summary judgment, the trial court displayed the same erroneous analysis used at the summary judgment hearing. This time, the lower court cited *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), to define stigma as a "situation where there has been 'an official branding of a person' and due process is implied because 'a person's good name, honor or integrity is at stake.' "(App. 14a).

The lower court found that the June 11, 1992 letter did not "meet the high threshold of being damaging to a person's good

name, honor or integrity," and accordingly, Dr. Hindera had "not proved the essential element of stigma required to state a claim for deprivation of a protected liberty interest." (App. 14a-15a).

The Petitioner contends that the decision below is in error in that it assigns a "high threshold" to showing stigma. *Wisconsin v. Constantineau* involved the constitutionality of a state statute authorizing designated people to cause notices to be posted in liquor outlets prohibiting the sale or gift of liquor to any person who "by excessive drinking" produced described conditions or exhibited specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community. 400 U.S. 433 (1971). The trial court assigned a "high threshold" to show stigma, yet *Wisconsin v. Constantineau* did not. Specifically, the Court approvingly quoted the lower court's decision to hold the Act unconstitutional:

> In 'posting' an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated by the statutes. It would be naive not to recognize that such 'posting' or characterization of an individual will expose him to *public embarrassment and ridicule* . . .

Id. at 436 (emphasis added). The trial court, in the instant case, erroneously failed to recognize the public embarrassment and ridicule caused by placing the June 11, 1992 letter, and its attachment on sexual harassment, into Dr. Hindera's public

personnel file as compounded by the contemperaneous mid-year nonrenewal of Dr. Hindera's contract.

Furthermore, the Court in *Wisconsin v. Constantineau* recognized "the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace . . . an official branding of a person" *Id.* at 436-37. The lower court, in the case at bar, failed to accord the same recognition to the stigma or "badge of disgrace" attached to Dr. Hindera because he was not renewed mid-year, contrary to normal University policy, and was left with the inference or innuendo in his (public) personnel file, that as a University professor he sexually harassed females at the University. He is branded as a sexual harasser — a "badge of infamy," considering the public policies set forth in both Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1988) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991.

Certainly, where the state attaches "a badge of infamy" to the citizen, due process comes into play. *Id.* at 437 (citation omitted). Moreover, the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. *Id.* quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring).

Certiorari should be granted and plenary review accorded due to the lower court's erroneous interpretation of *Wisconsin v. Constantineau*. Additionally, this Court should vacate the decision below with a remand to the court to determine whether stigma should have been decided by a jury.

CONCLUSION

For the foregoing reasons certiorari should be granted and this case should be accepted for plenary review.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 21, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-5042

JOHN J. HINDERA,

Plaintiff-Appellant,

versus

KHI V. THAI, individually and as official of Florida Atlantic University, LEONARD KOOPERMAN, individually and as official of Florida Atlantic University, ROSALYN Y. CARTER, individually and as official of Florida Atlantic University, LANCE DE-HAVEN-SMITH, individually and as official of Florida Atlantic University, and FLORIDA ATLANTIC UNIVERSITY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: KRAVITCH and BARKETT, Circuit Judges, and HARRIS*, Senior District Judge.

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* Honorable Stanley S. Harris, Senior U.S. District Judge for the District of Columbia, sitting by designation.

Appendix A

PER CURIAM:

The petition(s) for rehearing filed by Appellant, John J. Hindera, is *denied.*

ENTERED FOR THE COURT:

s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX B — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 22, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-5042

D. C. Docket No. 94-8350-CV-KLR

JOHN J. HINDERA,

Plaintiff-Appellant,

versus

KHI V. THAI, individually and as official of Florida Atlantic University, LEONARD KOOPERMAN, individually and as official of Florida Atlantic University, ROSALYN Y. CARTER, individually and as official of Florida Atlantic University, LANCE DE-HAVEN-SMITH, individually and as official of Florida Atlantic University, and FLORIDA ATLANTIC UNIVERSITY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

November 22, 1996

BEFORE: KRAVITCH and BARKETT, Circuit Judges, and HARRIS*, Senior District Judge.

---

* Honorable Stanley S. Harris, Senior U.S. District Judge for the District of Columbia, sitting by designation.

Appendix B

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: November 22, 1996

For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/4/97

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1. 11th Cir. R. 36-1 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX C — FINAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 28, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-8350-CIV-RYSKAMP

JOHN J. HINDERA,

Plaintiff,

vs.

KHI V. THAI, LEONARD KOOPERMAN, ROSALYN Y. CARTER, and LANCE DEHAVEN-SMITH, individually and as officials of Florida Atlantic University, and FLORIDA ATLANTIC UNIVERSITY,

Defendants.

FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court upon defendants' Motion for Summary Judgment, filed May 8, 1995. Plaintiff has responded in opposition.

I. BACKGROUND

From August of 1991 through December of 1992, plaintiff was employed by Florida Atlantic University as an assistant professor in the School of Public Administration. Plaintiff held a "tenure track" position whereby after five years of employment, plaintiff would be considered for a tenured position.

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In April of 1992, after one year of employment, plaintiff received an annual appraisal of progress toward tenure stating that he was making sufficient progress so as to result in an affirmative recommendation for tenure after five years of employment.

In early May of 1992, plaintiff was called into a meeting with the Acting Dean, defendant Carter and with a senior member of plaintiff's department, defendant Thai. During the meeting, plaintiff was informed that his habit of touching individuals while speaking with them was bothersome. Additionally, plaintiff was told not to seek out the identity of the individual who made the informal complaint because that individual was promised confidentiality.

On June 11, 1992, plaintiff received a letter from defendant Carter stating that Carter's secretary, Rita Kraemer, had been confronted by plaintiff about the informal complaint made against him after another "touching" episode. Ms. Kraemer admitted to complaining about plaintiff and accepted plaintiff's apology regarding the matter. Defendant Carter warned plaintiff to refrain from intimidating Ms. Kraemer. In addition, plaintiff was told to cease touching female members of the college community. Finally, defendant Carter stated in the letter that a copy of the letter would be placed in plaintiff's personnel file.

On July 30, 1992, plaintiff received a letter from Provost dehaven-Smith notifying him that his appointment at the University would cease on December 22, 1992. Pursuant to the tenets of the Board of Regents Collective Bargaining Agreement, plaintiff received a letter from Mary McBride, Acting Broward Provost, detailing the reasons for plaintiff's nonreappointment. Provost McBride stated that because plaintiff sought out the

identity of a student who complained about his class, increased the frequency of long distance phone calls, and insulted and argued with defendant Thai, plaintiff would not be reappointed.

In response to the letter of termination, plaintiff filed a Step 1 (one) grievance with the Office of the President which was denied on July 29, 1992. On November 9, 1992, plaintiff's grievance was denied for a second time in a Step 2 (two) grievance decision. At a July 20, 1995 hearing, plaintiff represented to this Court that the Collective Bargaining Unit prohibited him from proceeding with a Step 3 (three) full evidentiary hearing.

Accordingly, on June 24, 1994, plaintiff filed a three count complaint against defendants. On February 14, 1995, this Court ordered the dismissal of defendant Florida Atlantic University from this case because the University is not a body corporate and therefore cannot be a party to a suit. At the July 20, 1995 hearing, this Court granted summary judgment as to defendant dehaven-Smith because his conduct was not unconstitutional.

In his three count complaint, plaintiff alleges that false charges of sexual harassment were brought against him, subjecting him to a sexually discriminatory and retaliatory atmosphere in violation of Title IX of the Education Amendments Act. Plaintiff also alleges that his rights were violated pursuant to 42 U.S.C. § 1983 because he was deprived of liberty and property interests without due process. Finally, plaintiff alleges that the actions of the defendants constituted the intentional infliction of emotional distress.

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II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The Supreme Court has interpreted Rule 56 to mean that "*some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the party opposing the summary judgment may not rely on the pleading or mere denials of the allegations. *Anderson*, 477 U.S. at 256. The nonmoving party must go beyond the pleading and adduce some evidence showing that material facts are in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Rule 56 requires the nonmoving party to show through depositions, affidavits, answers to interrogatories and admissions on file that specific facts present a genuine issue for trial. *Id. See also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In accordance with Supreme Court precedent, the Eleventh Circuit has enunciated clearly the method for allocating burdens in a summary judgment proceeding:

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> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

III. DISCUSSION

Defendants contend that summary judgment should be granted as to Count I of plaintiff's complaint because defendants may not be sued under Title IX in their individual capacities and because in their official capacities, defendants are agents of Florida Atlantic University, a party previously dismissed from this case. Defendants assert that summary judgment should be granted as to Count II of plaintiff's complaint because plaintiff lacks a protected interest required to state a claim under 42 U.S.C. § 1983. Finally, defendants argue that if summary judgment is granted as to Counts I and II of plaintiff's complaint, Count III, plaintiff's state claim, should be dismissed based upon jurisdictional grounds. The Court will address each of these issues in the following discussion.

A. COUNT I — DEFENDANTS' VIOLATION OF TITLE IX IN THEIR INDIVIDUAL CAPACITIES

In Count I of his complaint, plaintiff alleges that he was subjected to false and fraudulent charges of sexual misconduct

concocted by defendants Thai and Kooperman. Additionally, plaintiff alleges that the remaining defendants knew or should have known that the charges were false. Plaintiff also contends that the records of these false incidents became open to the public under Florida's Public Records Act. Plaintiff asserts that because of these actions by the defendants, plaintiff was subjected to a sexually discriminatory and retaliatory atmosphere in violation of Title IX. Plaintiff seeks injunctive, declaratory and monetary relief.

In response, defendants argue that a remedy under Title IX is not available against individuals. Defendants contend that plaintiff falls to state a cause of action because those courts that have directly addressed the issue of individual liability under Title IX have held that only an appropriate educational program or activity may be sued as a proper defendant. *See Seamons v. Snow,* 864 F. Supp. 1111, 1116 (D. Utah 1994) (Title IX claims dismissed against school officials in their individual capacities); *Bowers v. Baylor University,* 862 F. Supp. 142 (W.D. Tex. 1994); *Doe v. Petaluma City School Dist.,* 830 F. Supp. 1560 (N.D. Cal. 1993).

Because defendants are neither educational programs nor activities, the Court finds that defendants may not be sued in their individual capacities pursuant to Title IX. Although the parties have located no Eleventh Circuit cases which address the issue of individual liability, the various district courts that have addressed the issue all hold that individual liability does not exist under Title IX. Plaintiff has not cited one case where individual liability has been found to exist under Title IX. Accordingly, defendants' Motion for Summary Judgment as to defendants in their individual capacities in Count I of plaintiff's complaint is GRANTED.

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B. COUNT I — DEFENDANTS' VIOLATION OF TITLE IX IN THEIR OFFICIAL CAPACITIES

In addition to suing defendants in their individual capacities, plaintiff is also suing defendants in their official capacities. Plaintiff argues that "official capacity actions seeking damages are deemed to be against the entity of which the officer is an agent." *Lassiter v. Alabama A & M University*, 3 F.3d 1482, 1485 (11th Cir. 1993). Thus, at a minimum, even if his individual capacity claims fail, plaintiff should be permitted to advance his official capacity claims.

The Court finds that because plaintiff brought this action against defendants in their official capacities, under *Lassiter*, the action is also deemed to be against the entity of which the officers are an agent. The defendants in this case, however, are agents of Florida Atlantic University which was dismissed by this Court's Order dated February 14, 1995, as an improper defendant in this action.

This Court's Order dismissing defendant Florida Atlantic University explains that part II of Chapter 240 of the Florida Statutes discusses the State University System. While Fla. Stat. § 240.205(4) authorizes the Board of Regents to sue or be sued, no comparable statute empowers a University to sue or be sued. Florida Statute § 240.205(4); *See also* Fla. Stat. §§ 240.15, 240.231. Accordingly, Florida Atlantic University is not a body corporate and therefore cannot be a party to a suit. *See United States v. Olavarrieta*, 632 F. Supp. 895, 898 (1986) (noting that because the University of Florida does not have the capacity to sue or to be sued it is not a properly named party to the suit). Thus, plaintiff's action against defendants in their official capacities is deemed to be brought against an improper

defendant, Florida Atlantic University. Accordingly, defendants' Motion for Summary Judgment as to defendants in their official capacities in Count I of plaintiff's complaint is GRANTED.

C. COUNT II - DEFENDANTS' VIOLATION OF 42 U.S.C. § 1983

In Count II of his complaint, plaintiff claims that defendants denied plaintiff his right to procedural due process in violation of 42 U.S.C. § 1983. Plaintiff alleges that he was deprived of his property interest in his employment and in a hearing considered to be a "benefit" of employment. Plaintiff also claims deprivation of his liberty interest in seeking future employment free from the stigma of the letter placed in his personnel file without being afforded due process.

Defendants contend that as a non-tentured professor, plaintiff has no entitlement to a property interest in his employment. Additionally, defendants argue that plaintiff has no property interest in a name-clearing hearing because the hearing is not a "benefit" plaintiff was entitled to. Further, defendants assert that plaintiff has failed to prove the elements of a deprivation of liberty interest, therefore plaintiff has no protected right upon which to base his § 1983 claim.

1. DEPRIVATION OF PLAINTIFF'S PROPERTY INTERESTS

In order to bring a cause of action under 42 U.S.C. § 1983 and the Fourteenth Amendment, a plaintiff must allege that defendants, acting under color of state law, have deprived him of a constitutionally protected interest in life, liberty or property without due process. *Wofford v. Glynn Brunswick Memorial*

Hosp., 864 F.2d 117, 118 (11th Cir. 1989). In addition, to have a property interest in a benefit, a person must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 33 L.Ed.2d 548 (1972).

The Court finds that the facts of the case at bar strongly resemble the facts of *Roth*, wherein the plaintiff was hired as an assistant professor at Wisconsin State University under a one year appointment, and was later informed that he would not be rehired for the next academic year. The Rules promulgated by the Board of Regents provided no real protection for a non-tenured teacher who was simply not re-employed for the next year. The Supreme Court concluded that the terms of the plaintiff's contract, which made no provision for renewal, secured absolutely no interest in reemployment for the next year. *Id.* at 574. The Court found nothing approaching a "common law" of re-employment whereby entitlement to employment may be implied from surrounding circumstances. *Perry v. Snidermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 548 (1972).

Applying these principles to the facts of the present case, the Court finds that because plaintiff was hired for a one year appointment in a tenure track position with no secured interest in re-employment for the next year, plaintiff has no constitutionally protected property interest in his employment. Additionally, the evidence which shows plaintiff was making sufficient progress toward a favorable tenure review in the future does not result in an implied right of entitlement to employment under the *Snidermann* standard because no right to re-employment was implied.

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Finally, plaintiff's claim for deprivation of his property interest in the "benefit" of a name-clearing hearing fails against these defendants because at the July 20, 1995 hearing, plaintiff represented to this Court that he didn't commence a Step 3 (three) grievance hearing due to the prohibitions of his Collective Bargaining Unit. Thus, plaintiff did not have a legitimate claim of entitlement to a hearing, and therefore lacks a protected property interest in that benefit.

2. DEPRIVATION OF PLAINTIFF'S LIBERTY INTEREST

In addition to the alleged deprivation of his property interest in his employment, plaintiff contends that without due process, he was deprived of a liberty interest in his good reputation and in his ability to seek other employment without stigma.

The standard for establishing the deprivation of a liberty interest without due process is set forth in *Buxton v. City of Plant City. Fla.*, 871 F.2d 1037, 1042-43 (11th Cir. 1989). A plaintiff must prove: (1) a false statement (2) of a stigmatizing nature (3) attending a governmental employee's discharge (4) made public (5) by the governmental employer (6) without a meaningful opportunity for employee name clearing. *Id.*

In the case at hand, the Court finds that plaintiff fails to establish that the letter placed in his personnel file was of a stigmatizing nature. The Supreme Court defines stigma as a situation where there has been "an official branding of a person" and due process is implied because "a person's good name, honor or integrity is at stake." *Wisconsin v. Constantineau,* 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971). Here, the letter in plaintiff's file merely accuses him of "bothersome behavior" which was

"in no way intentionally offensive." Such language does not meet the high threshold of being damaging to a person's good name, honor or integrity. Thus, plaintiff has not proved the essential element of stigma required to state a claim for deprivation of a protected liberty interest.

Thus, because plaintiff has no protected life, liberty or property interest, under the *Wofford* standard, plaintiff fails to state a cause of action pursuant to 42 U.S.C. § 1983. Accordingly, defendants' Motion for Summary Judgment as to Count II of plaintiff's complaint is GRANTED.

D. COUNT III — INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Count III of his complaint, plaintiff alleges that defendants' conduct in falsely accusing plaintiff of sexual harassment constituted intentional infliction of emotional distress, a state claim.

Because this Court has rendered judgment in favor of the defendants as to Counts I and II of plaintiff's complaint, there is no remaining federal nexus to which Count III may be joined. Thus, pursuant to 28 U.S.C. § 1367(c)(3), this Court may decline to exercise supplemental jurisdiction over the state claim because all claims over which the Court had original jurisdiction have been dismissed. Accordingly, Count III of plaintiff's complaint is DISMISSED on jurisdictional grounds.

IV. CONCLUSION

THE COURT has considered the Motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

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ORDERED AND ADJUDGED that

(1) Defendants' Motion for Summary Judgment as to Counts I and II of plaintiff's complaint is GRANTED. Final Judgment is entered for the defendants. The Court reserves jurisdiction to award costs and attorney's fees.

(2) Based upon jurisdictional grounds, Count III of plaintiff's complaint is DISMISSED.

The Clerk of Court shall CLOSE this case Any and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 28 day of July, 1995.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATED DISTRICT JUDGE

copies provided:

JC Miller
G. Ware Cornell